IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

(1) D.B. CRIMINAL APPEAL NO.73/2004

(Shaitan Singh & Another v. The State of Rajasthan)

(2) D.B. CRIMINAL JAIL APPEAL NO.148/2004

(Bheem Singh & Another v. The State of Rajasthan)

Under Section 374, Cr.P.C.,
and under Section 383, Cr.P.C.against
the Judgment dated 06-01-2004,
passed by Mr.M.D.Vaishnav, RHJS,
the learned District & Sessions Judge,
Jaisalmer in Sessions Case No.51/2001.

DATE OF JUDGMENT :::: 16-08-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. L.D.Khatri, for Appellant (s).
Mr. J.P.S.Choudhary, Public Prosecutor.

BY THE COURT: (PER HON'BLE BHANDARI, J.):-

Represented appeal No.73/2004 has been preferred by accused Shaitan Singh and Bheem Singh. Appeal No.148/2004 is preferred by accused Bheem Singh through Jail Authorities, therefore, said appeal was registered separately, but was ordered to be tagged with appeal No. 73/2004, thus both appeals are decided by the common judgment.

Both the appellants have preferred appeals, aggrieved by the judgment of the learned District & Sessions Judge, Jaisalmer dated 06.01.2004 in Sessions Case No.51/2001.

The facts giving rise to the present case are that the Bag Singh's Parcha Bayan was recorded by ASI Chandna Ram of Police Thana, Pokhran at about 12.45 a.m. on 20.08.2001 while said Bag Singh was admitted in Community Health Centre, Pokhran. Bag Singh stated that he and his brother Gopal Singh were going for grazing of their sheep and goat in the morning. They proceeded towards western side of their 'Dhani' and covered 1 k.m. distance, they were suddenly charged by Shaitan Singh, Bheem Singh and Chhug Singh. All the three accused charged two brothers with the intention to kill. Shaitan Singh having a sword in his hand, caused serious injuries on the head of Gopal Singh. His right ear remain hanging due to serious cut and deceased Gopal Singh further sustained injuries on his hand while saving himself. Gopal Singh fell down and at this stage he tried to save him then Bheem Singh having an axe in

his hand charged him causing injury on his palm which started bleeding, and thereafter also said Bheem Singh caused many injuries from blunt side of axe on his back. At that time when his brother fell down and was shouting, Chhug Singh having an axe in his hand caused further injuries to Gopal Singh from blunt side. They shouted then persons working in nearby field came there and at that stage all the three accused run away. Gopal Singh was in the pool of blood and lost his consciousness. The incidence was reported to have taken place at 10 a.m. Lastly it was stated that one of accused was having gun but same was not used. On the spot Lakh Singh, Gopal Singh and Vikram Singh came immediately. Lakh Singh thereafter went to 'Dhani' to give information of the incidence on telephone and in the meantime he and his brother brought to Pokhran in Utility vehicle.

On the basis of Parcha Bayan, police registered FIR under Sections 326, 307, 324 and 323/34 of IPC, being No. 34/2001. On the death of deceased Gopal Singh matter was registered under Sections 302, 326, 324 and 323/34 of IPC.

Police Conducted usual investigation and thereafter challan was filed against the three accused under Sections 302/34, 324/34 and 323/34 of IPC. Trial Court framed charged against three accused under Sections 302/34, 324/34 and 323/34 of IPC. Charge was explained to accused who then denied the charge and claimed trial.

At the trial prosecution produced 15 witnesses and exhibited 40 documents. The statements of accused were recorded under Section 313 Cr.P.C. The accused denied their guilt and stated that neither the Gopal Singh was murdered by them nor they had inflicted any injury to Bag Singh.

After detailed consideration, the trial Court acquitted Chhug Singh however Shaitan Singh and Bheem Singh were convicted and sentenced as under.

S.No.	***Name of accused***	***Convicted u/s***	***Sentenced***
1.	Shaitan Singh	302/34 IPC	Life imprisonment and a fine of Rs. 1,000
		324/34 IPC	Two years' rigorous imprisonment
2.	Bheem Singh	302/34 IPC	Life imprisonment and a fine of Rs. 1,000
		324/34 IPC	Two years' rigorous imprisonment
		323/34 IPC	One year's rigorous imprisonment

Learned counsel appearing for the appellant urged that Shaitan Singh was working in his field and at that time deceased Gopal Singh, Bag singh and Karan Sing with sword, lathi and axe charged at him. At that time, Khinv Singh was present and taking advantage of the said occurrence, said Khinv Singh caused blow to deceased Gopal Singh by sword. According to the learned counsel, the real event was suppressed and accused was falsely implicated which remained unnotice by the trial Court

despite of availability of evidence. It was further urged that Bheem Singh has wrongly been convicted under Section 302/34 of IPC because prosecution could not prove that Shaitan Singh and Bheem Singh came with a common intention to commit the offence of murder. Accused Bheem Singh had not been attributed any injury on vital part despite of having axe in his hand, same was used from blunt side causing simple injuries, thus it was prayed that conviction of Bheem Singh under Section 302/34 IPC is not sustainable even if prosecution case is noticed but with proper appreciation.

Per Contra, learned Public Prosecutor argued that prosecution has proved its case against both the accused beyond doubt, therefore, conclusions drawn by the trial Court are just and proper. It was urged that both the accused Shaitan Singh and Bheem Singh were having common intention to commit murder of deceased Gopal Singh. It is proved that both the accused were waiting for deceased Gopal Singh and injured Bag Singh who were charged with pre-determination, having weapons with them. Thus, both the accused have rightly been convicted. It was further argued that plea of learned counsel for appellant that deceased Gopal Singh was charged by his brother Khinv Singh is not proved from the material available on record rather plea taken by the defence was found to be false after proper consideration of material available on record by the trial

Court. It was thus prayed that the judgment of the trial Court should be maintained.

We have considered the rival submissions of both the learned counsel and perused the record carefully.

Injured Bag Singh is an eye-witness, whose statements were recorded as PW.13. Bag Singh stated that at about 9 a.m. when they were going towards western side of village for grazing of their sheep and goat then on covering 1 k.m. distance three accused namely Shaitan Singh, Bheem Singh and Chhug Singh charged his brother Gopal Singh. Shaitan Singh was having a sword, Bheem Singh having an axe and a gun and Chhug Singh was having an axe in his hand. Shaitan Singh first gave blows to deceased Gopal Singh from his sword and in the process of saving Gopal Singh, he was hit by an axe and sustained a cut injury on his palm. Bheem Singh thereafter caused two more injuries from the blunt side of the axe due to which he fell down. Gopal Singh sustained injuries even on his ear which remain hanging due to serious cut and even deceased Gopal Singh sustained injuries on his hand. When they shouted Vikram Singh, Lakh Singh and Gopal Singh came on the scene of occurrence and immediately on their reaching three accused run away. The witness further stated that in his presence an axe, three turbans and handle of sword was recovered from the spot. All these articles were found blood stained which were then recovered and

sealed by the police. In the cross-examination he stated that Bheem Singh caused injury to Gopal Singh by the axe and same allegation was attributed to Chhug Singh. It was however admitted that there was land dispute between them.

PW 1 Dr. Shanti Lal stated that he was working as Medical Officer in Community Health Centre, Pokhran, where Gopal Singh was brought for his treatment at about 12.50 p.m. on 20.08.2001. After about 10 minutes, deceased Gopal Singh died. Post Mortem Report was prepared by him and is exhibited as Ex.D-2. The following injuries were reported in the Post Mortem Report.

1. Incised wound on right parietal region– 9X4 cm. fracturing right parietal bone, deep in brain cutting and lacerating the brain material 7X5X6 cm. On right side at mid upper part above ear.
2. Incised wound. (on centre of scalp) -9-1/2 3 cm. Fracture of both right and left parietal bone at their union deep in the brain, cutting and lacerating the underlying brain matter – 8X4X7 cm. On centre of scalp.
3. Left ear sharply cut down attached to face with small tag of skin.
4. Incised wound 7X3 cm. Fracture of underlying radius bone on right forearm the front of right forearm middle transverse.

REMARKS BY MEDICAL OFFICER

All injuries are ante mortem in nature.

Cause of Death- After conducting the Post Mortem examination of Gopal Singh, I am of the opinion that deceased died of extensive cutting and laceraqtion of brain matter and massive loss of blood.

In the opinion of Doctor, deceased died out of injuries sustained and due to massive loss of blood. Dr. Shanti Lal PW. 1 also examined injured Bag Singh and stated that injured Bag Singh sustained one incised wound on his palm and other injuries were abrasions on shoulder as well as back. All the injuries, sustained by the injured, were found to be simple.

Statement of Lakh Singh PW. 3, PW. 4 Gopal Singh and Vikram Singh PW. 14 were also recorded. These witnesses reached on the seen of occurrence after hearing shout and immediately on reaching these three witnesses, accused run away from the place of occurrence, which was noticed by them. Thus, they proved presence of accused on the place of occurrence.

The statement of eye witness Bag Singh is quite material. Bag Singh stated that he and his brother Gopal Singh were going for the grazing of their sheep and goat at 9 a.m. And while they covered 1 K.m., charged by Shaitan Singh, Bheem Singh and Chhug Singh. According to his statement, injuries by a sharp

weapon on the vital part of Gopal Singh are attributed to Shaitan Singh who had given blows to Gopal Singh by a sword. Allegations were attributed even against Bheem Singh and Chhug Singh. Bheem Singh caused injuries by an axe from its blunt side which all were found to be simple. Chhug Singh was acquitted by the trial Court. The presence of accused is proved by three independent witnesses PW.3 Lakh Singh, PW.4 Gopal Singh and PW. 14 Vikram Singh who reported on the scene of occurrence immediately after hearing shouting and on their reaching accused run away from the place, thus presence of the accused was proved by the corroborating evidence of three witnesses. So far the statement of Bag Singh recording injuries sustained by him and Gopal Singh, same are corroborated by medical evidence in which Gopal Singh sustained injuries from a sharp weapon on a vital part sufficient to cause death whereas, injuries of Bag Singh were found to be simple.

In the light of discussions made above, we find that trial Court has not committed any error in recording its finding of guilt against accused Shaitan Singh. The evidence available on record shows that Shaitan Singh was not only pre-determined but equipped with the weapon to kill Gopal Singh. Said accused charged Gopal Singh immediately when deceased reached close to accused . Shaitan Singh gave blows from the sword on the vital part and on the arm of deceased Gopal Singh, therefore, it

becomes clear that Shaitan Singh was having intention to cause murder, therefore, finding recorded by the trial Court in regard to accused Shaitan Singh calls for no interference for his conviction under Section 302 of IPC.

So far as accused Bhim Singh is concerned, the allegation against him is causing injuries to injured Bag Singh by an axe. However, all those injuries were found to be simple. As per the statement in 'Parcha-Bayan' and examination-in-chief by the eye witness Bag Singh, there exists no allegation against Bheem Singh to have caused any injury to deceased Gopal Singh, though for the first time, in the cross-examination, said eye witness attributed one blow by the accused Bheem Singh to deceased Gopal Singh, however this part of statement cannot be given credence, hence discarded being contrary to statement in "Parcha Bayan" and in examinatin-in-chief thus, prosecution could not prove that accused Bheem Singh had also come with the intention to kill deceased Gopal Singh, because the evidence produced by the prosecution proves use of axe from its blunt side, causing only simple injuries to Bag Singh (injured). If accused Bheem Singh was having intention to kill Gopal Singh or Bag Singh, then having an axe in his hand, he would have used the same from sharp side, but as per the statement in 'Parcha-Bayan' as well as examination-in-chief, it has come on record that accused Bheem Singh caused injuries to injured Bag

Singh and not to deceased Gopal Singh, by using axe from its blunt side and all those injuries are reported to be simple. Thus, it cannot be said that even Bheem Singh was having intention to kill Gopal Singh. Therefore, the facts do not suggest and prove it to be a case of common intention between the two accused to cause murder of deceased Gopal Singh. Accused Bheem Singh, however, caused simple injuries by using axe. Hence, case against accused Bheem Singh is proved to the extent of offences under Sections 324 and 323 of IPC. Therefore, finding of the trial Court against accused Bheem Singh can be maintained only to the extent of his conviction under Sections 324 and 323 of IPC.

The learned trial Court failed to consider that according to the statement of eye witness Bag Singh who was otherwise injured in the case, Shaitan Singh gave blow to Gopal Singh by a sword, whereas accused Bheem Singh caused injuries to Bag Singh. The conclusions of the learned trial Court are required to be judged after taking note of the contradiction in the statement of Bag Singh, whose statement in cross-examination was different than in the 'Parcha Bayan' and examination-in-chief. Hence his statement can be relied only to the extent it is corroborated by the medical evidence and portion of the statement having contradiction cannot be relied, being doubtful. Thus, on minute examination, we find that so far as Shaitan

Singh is concerned, he was having intention in his mind to kill Gopal Singh and accordingly when Gopal Singh came near to him, he caused serious blow on the vital part of deceased Gopal Singh. However, Bheem Singh was not having the same intention as said Bheem Singh used axe only from blunt side, thus case against accused Bheem Singh is made out under Sections 324 and 323 of IPC. Thus, to this extent, we are inclined to interfere with the judgment of the learned trial Court as the trial Court has wrongly held it to be a case of common intention of the accused to attract Section 34 of IPC. From the facts available on record, it is clear that intentions of two accused were not common but different.

The argument of the learned counsel that deceased Gopal Singh was caused injuries by his brother Khinv Singh, due to dispute regarding their ancestral properties, according to him, prosecution made out a new story and wrongly levelled allegation against Shaitan Singh, Bhim Singh and Chhug Singh. In that regard, our attention was drawn towards Ex.D-3, where presence of Khinv Singh has been shown on the place of occurrence. We have carefully considered this argument and after perusal of the record, find that defence story is false as perusal of another document Ex.D-7 reveals that while accused Shaitan Singh lodged FIR on 10.10.2001 relating to the incident of 20.08.2001 (Ex.D-7), it was no-where stated that Khinv

Singh was involved in the incident. Firstly, the said FIR was lodged, after several days. Secondly, the allegations made therein are against injured Bag Singh, Karan Singh and deceased Gopal Singh. In the said FIR, accused Shaitan Singh stated that a land dispute was going on between him and deceased Gopal Singh, injured Bag Singh and Karan Singh. Thus, all the three assembled together and while he was working in his field,Gopal Singh having sword in his hand, Bag Singh having an axe and Karan Singh having a lathi charged him, due to which he sustained injuries in his hand and fell down. It is due to shouting, neighbours working in the field saved him and, in that process, if injury was sustained by Gopal Singh and Bag Singh, then he is not aware of this fact. Reason for delay in lodging the FIR has been given. However, in the said FIR, accused Shaitan Singh nowhere alleged that Khinv Singh was either involved in the matter or caused injuries to deceased Gopal Singh. It seems that defence tried to create suspicion on account of presence of Khinv Singh shown in Ex.D-3, but mere presence is not sufficient to connect Khinv Singh with the occurrence unless there is material available on record to prove his act in the offence. In fact, documents exhibited by defence itself demolish their case because when accused Shaitan Singh lodged an FIR then if Khinv Singh was involved in the matter that not only his presence was required to be shown in the FIR, but allegation for

causing injuries to deceased Gopal Singh by Khinv Singh was also required to be attributed. Moresoever, this FIR was lodged after 50 days of occurrence. However as discussed, name of Khinv Singh does not exist therein. Thus, other than raising an argument based on a false defence taken, there is nothing on record to substantiate the plea taken by the counsel for appellant.

In view of the fact that prosecution could not prove case of common intention between the two accused to commit an offence of murder, therefore, conviction of accused Bheem Singh under Section 302/34 of IPC cannot be maintained. Said accused, having attributed only simple injuries to injurd Bag Singh, that too by using axe from its blunt side, can be convicted under Sections 324 and 323 of IPC only.

In view of the discussions made above, we are inclined to partly accept these appeals and accordingly, we modify the judgment of the trial Court and convict accused Shaitan Singh under Sections 302 and set aside his conviction under Section 324/34 of IPC. Shaitan Singh is accordingly sentenced with life imprisonment and a fine of Rs.10,000/-, in case of default to pay to serve sentence of three months.

The conviction of accused Bheem Singh under Section 302/34 of IPC is set aside, however, his conviction under Sections 324 and 323 of IPC are maintained. The said accused

is however sentenced to the period already undergone by him. Accused Bheem Singh was released on bail by this Court on 12.03.2004, hence his bail bonds are released.

(MUNISHWARNATH BHANDARI),J. **(BHAGWATI PRASAD),J.**

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